U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: February 23, 2000
No.: **1997 INA 444**

In the Matter of:

JOYCE SLEVIN, Employer,

on behalf of

CRYSTAL CLOTEL JOHNSON, Alien.

Certifying Officer: Dolores DeHaan, Region II..
Appearance: M. N. Fish, Esq., of New York, New York, for the Employer and Alien.

Before :Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of CRYSTAL CLOTEL JOHNSON (Alien) by JOYCE SLEVIN (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and Alien requested review pursuant to 20 CFR § 656.26.[1]

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On December 28, 1995, the Employer applied for labor certification to permit her to employ the Alien[2] on a permanent basis as a "Child Monitor" to perform the following duties in her household:

> Observe and monitor play activities of child by reading to and playing games with child. Prepare and serve child's meals. Dress and assist child in bathing and dressing. Accompany child on walks. Wash and iron child's clothes. Keep child's quarters neat and clean.

AF 26, box 13. The work week was forty-four hours from 8:00 AM to 8:00 PM, with four hours off per day for rest and meal breaks. On Saturday the hours were 8:00 A.M. to 12:00 Noon. The wages were based on $8.29 per hour for the base rate, and were equal to $364.68 per week. Overtime was to be compensated at the same hourly rate with no increase.[3] This was a live-in position, based on the Contract of Employment. Employer agreed to furnish living accommodations at no cost to the Employee. The position was classified as "Child Monitor" under DOT Code No. 301.677-010.[4] The Application stated indicated no education

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[3] A national of Barbados, the Alien was born 1960. She finished primary school and a secondary school in Barbados in 1976. From April 1986 to May 1992 the Alien worked in "Child Care" in a day care center in Barbados. From June to August 1992 she was a "Visitor." From September 1992 to the date of application she worked for the Employer in the Job Offered. She was living and working in the United states under a B-2 visa. AF 19-22.

[3] No restriction was placed on the number of overtime hours.

[4]301.677-010 **CHILD MONITOR** (domestic ser.) alternate titles: nurse, children's. Performs any combination of following duties to attend children in private home: Observes and monitors play activities or amuses children by reading to or playing games with them. Prepares and serves meals or formulas. Sterilizes bottles and other equipment used for feeding infants. Dresses or assists children to dress and bathe. Accompanies children on walks or other outings. Washes and irons clothing. Keeps children's quarters clean and tidy. Cleans other parts of home. May be designated Nurse, Infants' (domestic ser.) when in charge of infants. May be designated Baby Sitter (domestic ser.) when employed on daily or hourly basis. *GOE: 10.03.03 STRENGTH: M GED: R3 M1 L2 SVP: 3 DLU: 81*

requirements, no training requirements, and work experience consisting of three months in the Job Offered. AF 26, box 14. The Other Special Requirement was for references.

Notice of Findings. On February 21, 1997, a Notice of Findings (NOF) by the CO advised that certification would be denied, subject to Employer's rebuttal. AF 51-53. Citing 20 CFR §§ 656.20(c)(8), 656.21(a)(3)(iii)(A), 656.21(b)(6), and 656.24(b)(2)(ii), the NOF noted, first, that the Employer failed to file documentation of the Alien's work experience, and, second, that the Employer had rejected an apparently qualified U. S. worker for reasons that were neither lawful nor job-related, referring to the U. S. worker, Ms. Coral Howell.

As to the first issue, the NOF stated, "Section 656.21(a)(3)(iii)(A) requires documentation in the form of written statements from past employers that the alien has at least one (1) year of full time paid work experience in the duties you are presently requiring. Alien's documentation failed to include the requested dates of employment, a detailed statement of the job duties, the wages paid for such duties and number of hours per days worked per week." AF 52. The state employment security agency ("state agency") first requested completion of the Alien's statement of qualifications on January 3, 1996. AF 30. At that time, the state agency said, "Alien must furnish documentation of one year's paid experience or the equivalent in the duties of the job." AF 29. The detailed instructions said the Employer must submit the following:

> Documentation of the alien's paid experience in the form of statement from past employer setting forth the date (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of duties performed on the job, equipment and appliances used, and the amount of wages paid per week or month. The total paid experience must be equal to 1 full year's employment on a fulltime basis, *e.g.* 2 years' experience working half-days is equal to one year's experience. Each statement documenting the alien's paid experience must be signed and must contain the name and address of the person who signed it, and show the date on which the statement was signed. ...

AF 28. As the description of her work experience as a day care nursery assistant in Barbados dated February 5, 1993, and the Employer's own statement of the Alien's services in the Job Offered from September 1992 to December 1995 were part of Employer's 1995 application, both AF 20-21 and AF 28-30 were before the CO when these rebuttal instructions were issued in the NOF.

Rebuttal. The Employer filed her rebuttal on March 28, 1997. She described the position as "Live-in Housekeeper" and addressed the rejection of U. S. worker Coral Howell. AF 52-59. She did not respond to the requests under 20 CFR § 656.21(a)(3)(iii)(A), however.

Final Determination. On May 13, 1997, the CO denied certification on grounds that the Employer failed to provide a satisfactory rebuttal to the NOF. The CO explained that the NOF required the submission of written statements by the Alien's past employers that she had at least one (1) year of full time paid work experience, that the rebuttal had failed to comply with the

request, and that the Application was denied for that reason. AF 60.

Employer's appeal. On June 11, 1997, Employer requested BALCA administrative judicial review. AF 62-82. Employer stated that evidence of "at least one year of paid experience was duly submitted on February 13, 1996, " adding that the letter and other parts of the file was lost or misplaced by the Department of Labor. Employer attached to the appeal photocopies of AF 20, 29, 30. See AF 72, 75, 76

DISCUSSION

Burden of proof. Controlling precedent places on the Employer the burden of proving that it is offering full-time employment. **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988)(*en banc*). The CO's findings that the Employer did not sustain the burden of proof will be affirmed, if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. **Haddad**, 96 INA 001 (Sep. 18, 1997). Consequently, in all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification.[5]

Documentation reasonably requested. It is well-established that Employer's failure to produce documentation reasonably requested by the Certifying Officer is a basis for the denial of certification. **Norwood Computer Services, Inc.**, 93 INA 232 (Jul. 8, 1994); **Edward Gerry,** 93 INA 467 (Jun. 13, 1994). The supporting evidence the NOF directed the Employer to file consisted of documentation by the Alien's past employers that she had at least one year of qualifying full time paid work experience. As the Employer's statement and the statement by the Barbados employer were already part of the record when the NOF was issued, it is reasoned that both were considered and that neither of them was acceptable for the purposes of the CO.

First, the statement by Ms. Slevin did not comply with the NOF request. Employer said the Alien had worked for her in the job Offered from September 1992 to December 1995. In a 1992 case the CO made a similar request for proof of qualifying work experience and the proof offered consisted of the alien's experience with the sponsoring employer. BALCA

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[5]Congress enacted § 212(A)(14) of the Immigration and Nationality Act of 1952 (as amended by § 212(a)(5)(a) of the Immigration Act of 1990 and recodified at 8 U.S. C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." **Cheung v. District Director, INS**, 641 F2d 666, 669 (9th Cir., 1981); **Wang v. INS**, 602 F2d 211, 213 (9th Cir., 1979). To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Pursuant to the favored treatment Congress legislated for the limited class of alien workers whose skills were needed in the U. S. labor market, 20 CFR § 656.2(b) assigned the burden of proof in an application for alien labor certification under this exception to the general exclusion of aliens under the Act. Because certification of alien workers is an exception to the general exclusion of immigrants, the Panel is required to construe its provisions strictly, and it must resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen,** 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

affirmed denial of certification because the period the Alien spent at work for the employer was not qualifying experience. **Tecnomatix, Inc.**, 90 INA 510 (Jan. 31, 1992). As this holding was squarely in point in this case, the previous filing of AF 21 was not adequate to comply with the NOF request.[6]

Second, the previously filed statement of work experience in Barbados was not sufficient to comply with the NOF for a different reason. The Application clearly demanded experience as a Child Monitor in the Job Offered. The position of Child Monitor was different from a Day Care Center Nursery Assistant, a Related Occupation in which the Alien offered the work experience described by her former employer in AF 20.[7] Since the Employer gave no indication at AF 26, box 14, that she would accept work in any Related Occupation in place of experience in the Job Offered, the Alien's evidence of employment as a Day Care Center Nursery Assistant could not satisfy the hiring criteria of experience in the Job Offered that the Employer's Application expressly required. **Zigzag Venture Group**, 94 INA 532 (Aug. 1, 1996); **Showboat Restaurant**, 89 INA 027 (Jan. 31, 1990).

Summary and conclusion. Because the Alien's experience was not in the Job Offered, her Background Statement did not demonstrate that she met the minimum requirements for the position. **Mr. & Mrs. Marc Cohen**, 95 INA 150 (Dec. 5, 1996).[8] As the NOF reasonably requested that the Employer clarify the Alien's background to determine whether she met the Employers's actual minimum requirements to remedy this deficiency, the Employer's failure to comply was ground for the denial of certification. **Adler K. Chia**, 93 INA 153 (Jan. 31, 1995).

Accordingly, the following order will enter.

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[6]Employer must establish that the alien possess the stated minimum requirements for the position. **Active Electronics, Inc.**, 95 INA 160 (Dec. 23, 1996).

[7]359.677-018 **NURSERY SCHOOL ATTENDANT** (any industry) alternate titles: child-care leader; child-day-care center worker; day care worker. Organizes and leads activities of prekindergarten children in nursery schools or in playrooms operated for patrons of theaters, department stores, hotels, and similar organizations: Helps children remove outer garments. Organizes and participates in games, reads to children, and teaches them simple painting, drawing, handwork, songs, and similar activities. Directs children in eating, resting and toileting. Helps children develop habits of caring for own clothing and picking up and putting away toys and books. Maintains discipline. May serve meals and refreshments to children and regulate rest periods. May assist in preparing food and cleaning quarters. *GOE: 10.03.03 STRENGTH: L GED: R3 M2 L3 SVP: 4 DLU: 81.*

[8]Although this case fits the holding in **Hagopian & Sons, Inc.**, 94 INA 178 (May 4, 1995), that where the alien did not possess the minimum job requirements at the time of hire certification was properly denied, certification was not denied for this reason.

ORDER

The Certifying Officer's decision denying certification under the Act is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.